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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits respondent's criminal prosecution for manufacturing marijuana because the government obtained a consent judgment in a civil action that sought the forfeiture of property of respondent on the ground that it facilitated illegal drug activities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeopardy claim (App., *infra*, 38a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 21 U.S.C. 841 and 881 are reproduced at App., *infra*, 49a-71a.

STATEMENT

1. On July 30, 1992, police officers executing a warrant at respondent's property discovered 142 marijuana plants growing on land just outside the boundaries of the property. Inside respondent's house, the officers discovered marijuana seeds, stems, and stalks, two loaded firearms, and a growlight. App., *infra*, 2a.

On September 30, 1992, the government filed a civil complaint, pursuant to 21 U.S.C. 881(a)(7), seeking forfeiture of respondent's residence. App., *infra*, 2a-3a. The complaint alleged that, "[f]or several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance." *Id.* at 29a. The court scheduled the trial of that action for July 1993. Before trial, however, respondent and his wife entered into a settlement under which they agreed to pay the government $13,250 in lieu of the forfeiture. *Id.* at 32a-34a. A consent judgment embodying that agreement was entered on May 24, 1993. *Id.* at 35a-37a.

On February 5, 1993, while the civil action was pending, a federal grand jury returned a criminal indictment charging respondent with one count of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 3a. A jury trial on that

charge commenced on June 30, 1993, and concluded with respondent's conviction on July 2, 1993. *Ibid.* Following his conviction, respondent moved to dismiss the indictment on the ground that his "conviction constitute[d] double jeopardy, as a result of the civil forfeiture proceeding instituted and concluded in favor of the government before his conviction." *Id.* at 38a. The district court denied that motion, explaining that the consent judgment in the forfeiture action was not an "adjudication" and that, in any event, the forfeiture and the criminal conviction were two components of "a single, coordinated prosecution." *Id.* at 39a. Respondent was sentenced to 63 months' imprisonment. *Id.* at 44a.

2. A divided panel of the Sixth Circuit reversed respondent's criminal conviction on the ground that the conviction was "a second punishment that violates the Double Jeopardy Clause." App., *infra*, 6a. The court first rejected the district court's view that the consent decree in the civil forfeiture proceeding was not an "adjudication" for double jeopardy purposes. By analogy to cases in which a criminal defendant pleads guilty pursuant to a plea agreement, the court concluded that jeopardy attached in the forfeiture proceeding when the court accepted the stipulation of forfeiture and entered a judgment of forfeiture against respondent. *Id.* at 7a.

The court next concluded that "any civil forfeiture under [] 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." App., *infra*, 11a. The court believed that under *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), such forfeitures are punitive because they do not "serve solely a remedial purpose." App., *infra*, 10a. The court also held that

under the "elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), the civil forfeiture and the criminal conviction were "punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense," and therefore the criminal offense "is in essence subsumed by the forfeiture statute." App., *infra*, 12a.

Finally, the court rejected the district court's conclusion that the civil forfeiture and criminal actions were a "single proceeding" for purposes of the Double Jeopardy Clause. App., *infra*, 13a-17a. The court recognized that "[t]here is disagreement among the circuits * * * as to when a civil forfeiture action and criminal prosecution can properly be considered components of a single proceeding so that double jeopardy is not triggered." *Id.* at 14a (citing cases). It also "acknowledge[d]" but "f[ou]nd it unnecessary to fully adopt" the Ninth Circuit's suggestion in *United States* v. *$405,089.23*, 33 F.3d 1210, 1216 (1994), amended on denial of reh'g, 56 F.3d 41 (1995), petition for cert. pending, No. 95- ——, that "parallel civil forfeiture and criminal proceedings will always violate the Double Jeopardy Clause." App., *infra*, 15a-16a. In the instant case, the court concluded, there was "no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution" of respondent "as a coordinated proceeding." *Id.* at 16a.

Judge Milburn dissented. App., *infra*, 19a-27a. He argued that this case involved "a sufficiently coordinated proceeding" to dispel double jeopardy concerns. *Id.* at 20a. Judge Milburn noted that the Eleventh Circuit in *United States* v. *One Single Family Residence*, 13 F.3d 1493 (1994), concluded that civil and criminal proceedings were sufficiently coordinated to be the same case for double jeopardy

purposes even though an indictment was returned five months after the civil forfeiture action was instituted, and the civil and criminal judgments were entered at different times. App., *infra*, 21a n.2. The key to that conclusion, Judge Milburn contended, was a recognition that contemporaneous civil and criminal proceedings do not ordinarily raise the specter that the government is seeking to punish the defendant a second time simply because it is dissatisfied with the sanction it obtained at a first trial. *Ibid.*

Following the lead of the Eleventh Circuit, and of the Second Circuit in *United States* v. *Millan*, 2 F.3d 17 (1993), cert. denied, 114 S. Ct. 922 (1994), Judge Milburn urged that the potential for government abuse should be the central factor in determining whether contemporaneous civil and criminal actions are a "single proceeding" for double jeopardy purposes. He concluded that the civil and criminal actions in this case were indeed a single proceeding, because they "took place in close time proximity to one another," *id.* at 22a, respondent understood when he settled the forfeiture action "that the government was pursuing its full range of remedies against him," *ibid.*, the government instituted both the civil forfeiture action and the criminal action "before it knew the outcome of either case," *id.* at 22a-23a, and the total punishment imposed in the coordinated proceeding did not exceed the punishment authorized by Congress, *id.* at 25a.

Judge Milburn also disagreed with the majority's conclusion that the civil forfeiture and the crime for which respondent was convicted were "the same offense." App., *infra*, 26a-27a. He noted not only the different statutory elements of each "offense," but

also that the forfeiture complaint and the indictment alleged different theories of liability. The indictment charged respondent "with the manufacture of marijuana only during the year 1992" while the civil forfeiture complaint alleged that respondent's "property was involved in the commission or facilitation of both processing and distribution of a controlled substance over the course of several years." *Id.* at 26a, 27a. "Under those circumstances," he concluded, "the criminal prosecution and the civil forfeiture action would undoubtedly relate to separate offenses under the Double Jeopardy Clause." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

This case presents three related and important issues under the Double Jeopardy Clause. First, the Sixth Circuit erroneously concluded that the civil forfeiture of property used to facilitate criminal activity necessarily constitutes "punishment" under the Double Jeopardy Clause. Second, in concluding that the civil forfeiture and criminal conviction inflicted punishment for the "same offense," the Sixth Circuit misapplied this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), and its progeny, which hold that two offenses are not the "same" if each has an element that the other does not have. Third, as Judge Milburn argued in dissent, the Sixth Circuit's conclusion that the civil and criminal actions against respondent and his property must be deemed "separate proceedings" serves no valid interest protected by the Double Jeopardy Clause. As with the Ninth Circuit's ruling in *United States* v. *$405,089.23* (see 33 F.3d 1210 (1994), amended on denial of reh'g, 56 F.3d 41 (1995)), in which we have also filed a

petition for a writ of certiorari, the Sixth Circuit's rulings exacerbate a circuit conflict on the extent to which the government may pursue factually related civil forfeiture and criminal actions. Accordingly, this Court's review is warranted.

1. Traditionally, the civil forfeiture of property involved in criminal activity and the criminal prosecution of the property's owner for the same underlying conduct did not raise issues under the Double Jeopardy Clause. See, *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984); *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931). As we explain more fully in our petition in *United States* v. *$405,089.23*, however, in which we seek review of the Ninth Circuit's conclusion that the forfeiture of proceeds of narcotics activity always must be deemed "punishment" for double jeopardy purposes, the lower courts are deeply divided on the question whether, or to what extent, this Court's decisions in *United States* v. *Halper*, 490 U.S. 435 (1989), *Austin* v. *United States*, 113 S. Ct. 2801 (1993), and *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), have changed that rule.

The Sixth Circuit held that the civil forfeiture of property used or intended to be used to facilitate drug trafficking *always* imposes "punishment" for double jeopardy purposes and that, under *Halper*, such a forfeiture bars a subsequent criminal punishment. The Court in *Halper*, however, cautioned that it was announcing a rule for "the rare case" in which "a prolific but small-gauge offender [was subjected] to a [civil] sanction overwhelmingly disproportionate to the damages he has caused," so that the sanction

"may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. As *Halper* recognized, the government may exact civil sanctions that achieve "rough remedial justice" without raising double jeopardy concerns. Accordingly, under *Halper*, it is ordinarily necessary to examine the particular civil sanction imposed on a case-by-case basis to determine whether it constitutes "punishment" for double jeopardy purposes. *Id.* at 446; see also *id.* at 452-453 (Kennedy, J., concurring).

This Court's decision in *Austin* v. *United States*, *supra*, does not require a categorical approach to forfeiture statutes for purposes of double jeopardy analysis. *Austin* held that the forfeiture provisions of 21 U.S.C. 881(a)(7)—the same statute at issue here—impose "punishment" for purposes of the threshold applicability of the Eighth Amendment's Excessive Fines Clause. The Court suggested that the forfeiture provisions involved in that case were sufficiently bound up with the culpability of the property's owner as to render those provisions punitive in all applications, 113 S. Ct. 2806-2810, 2812 & n.14, and the Sixth Circuit found that conclusion dispositive of the punishment issue in the double jeopardy context as well. App., *infra*, 10a-11a. *Austin* recognized, however, that it "ma[de] little practical difference" in that case whether the Excessive Fines Clause was held to apply to all forfeitures under the statutes at issue in that case, "or only to those that cannot be characterized as purely remedial." 113 S. Ct. at 2812 n.14. That was true because the Eighth Amendment is relevant only when a fine is excessive and "a fine that serve[d] purely remedial purposes [could not] be considered 'excessive' in any event." *Ibid.*

In the double jeopardy context, a departure from *Halper*'s case-by-case approach to the issue whether a particular civil sanction inflicts punishment has enormous practical consequences. In that setting, a categorical conclusion that all civil forfeitures under the statute at issue constitute punishment may completely bar a later criminal prosecution of the owner, even if the particular prior civil forfeiture was fairly characterized as substantially remedial. See *Austin*, 113 S. Ct. at 2805 n.4 (citing *89 Firearms* and recognizing that statutory forfeitures may be wholly remedial). That result would greatly expand *Halper*'s rule for the "rare case," 490 U.S. at 449, and would dramatically alter the common practice of pursuing both forfeiture of offending property as a civil remedy and punishment of its owner as a criminal remedy. Neither *Halper* nor a proper application of double jeopardy principles would support such a rule.[1]

The punishment issue raised by this case differs to some extent from the analogous question presented by our petition in *$405,089.23*. Here, the complaint sought forfeiture of respondent's property on the theory that the property was used or intended to be used to facilitate the commission of a criminal offense. In *$405,089.23*, forfeiture was sought on the theory that the property represented the ill-gotten gains

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[1] This Court's double jeopardy decision in *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), that a particular state tax on the possession of dangerous drugs constituted punishment in all of its applications does not suggest otherwise. The analysis in that case was tailored to the specific nature and purposes of a tax statute, see *id.* at 1946, 1948, not to civil forfeitures or to other civil sanctions that may serve remedial aims, see *89 Firearms*, *supra*.

from criminal activity. The Court's resolution of the punishment issue in *$405,089.23* therefore will not necessarily resolve the analogous question in cases like this one. At the same time, the extent to which this Court's decisions since *Halper* changed the double jeopardy principles that have long applied to civil forfeitures of property used to commit criminal offenses has divided the lower courts, compare App., *infra*, 11a, with *United States* v. *Morgan*, 51 F.3d 1105, 1113 (2d Cir. 1995) ("we have held that *Halper* does not apply to forfeiture claims") (citing *United States* v. *$145,139*, 18 F.3d 73, cert. denied, 115 S. Ct. 72 (1994)), petition for cert. pending, No. 95-14 (July 3, 1995), and has generated considerable litigation throughout the country. For that reason, this case merits this Court's plenary consideration.

2. Even if the Sixth Circuit were correct in concluding that a civil forfeiture of property used or intended to be used to facilitate a narcotics offense must always be considered "punishment" for an "offense" for double jeopardy purposes, the court was wrong to treat the forfeiture "offense" as the "same offense" as the narcotics crime for which respondent was punished. Under *Blockburger* v. *United States*, 284 U.S. 299 (1932), whether two offenses are the "same" for double jeopardy purposes does not turn on whether the same illegal conduct was involved in both, but on a comparison of the elements that the government must prove to prevail under each. See *Witte* v. *United States*, 115 S. Ct. 2199, 2204 (1995); *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993).[2]

[2] In *Dixon*, 113 S. Ct. at 2860, the Court overruled the "same-conduct" rule of *Grady* v. *Corbin*, 495 U.S. 508 (1990), under which a subsequent prosecution was generally prohibited if the government, to establish an essential element of that prosecution, would have to prove conduct that constituted an offense for which the defendant had already been prosecuted.

The Sixth Circuit concluded that the forfeiture and criminal "offenses" were the "same" in this case on the theory that the narcotics crime is a lesser-included offense of the forfeiture—"[t]he criminal offense is in essence subsumed by the forfeiture statute." App., *infra*, 12a. That reasoning disregards the controlling decisions of this Court, which make clear that one "offense" is included within another only if every conceivable application of the "greater" offense necessarily establishes the existence of the "included" offense. See *United States* v. *Woodward*, 469 U.S. 105, 108 & n.4 (1985) (per curiam); *Brown* v. *Ohio*, 432 U.S. 161, 168 (1977) (offense is lesser-included under *Blockburger* if it is "invariably true" that the lesser offense "requires no proof beyond that which is required for conviction of the greater"); accord *Schmuck* v. *United States*, 489 U.S. 705, 716 (1989).

The statute that authorizes forfeiture does not "necessarily" require proof that the property's owner engaged in marijuana manufacturing; forfeiture may be appropriate if the property in question facilitated *any* narcotics violation committed by *anyone*, even if that person is not the owner. See *Origet* v. *United States*, 125 U.S. 240, 246 (1888) ("The person punished for the [criminal] offense may be an entirely different person from the owner of the merchandise, or any person interested in it"); see also *Austin*, 113 S. Ct. at 2810 n.11. Indeed, forfeiture is authorized by 21 U.S.C. 881(a)(7) even if the property was

merely "intended" for use in a narcotics offense. Conversely, "the substantive criminal provision under which [respondent] was prosecuted[] does not render unlawful an *intention* to [manufacture marijuana]; only the completed act of [manufacturing marijuana] is made a crime" by 21 U.S.C. 841(a), *89 Firearms*, 465 U.S. at 363-364, and then only if committed with criminal intent.[3] In those circumstances, the Sixth Circuit erred in concluding that the narcotics crime was necessarily included within the forfeiture "offense."

3. Finally, the Sixth Circuit was also wrong to conclude that the parallel civil and criminal actions in this case did not constitute a "single proceeding" for double jeopardy purposes. While recognizing a split in the circuits on whether parallel civil and criminal actions may be deemed a "single proceeding," App., *infra*, 14a, the Sixth Circuit exacerbated that division of authority. The Sixth Circuit declined to adopt the Ninth Circuit's conclusion that parallel actions may never be considered a single proceeding. It also rejected the Second and Eleventh Circuit's view that such parallel actions generally do not present the potential for abuse that the Double Jeopardy Clause is designed to prevent—*i.e.*, that the government "is

[3] Nor does the crime of manufacturing marijuana require proof that any property was used, or intended for use, to facilitate the production of the contraband. See 21 U.S.C. 841(a)(1). Indeed, the marijuana plants that formed the basis for respondent's conviction were growing beyond respondent's property line (App., *infra*, 2a), and it was the additional discovery of items such as marijuana seeds, a growlight, and firearms on the property that supported the forfeiture action.

seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *Halper*, 490 U.S. at 451 n.10. Instead, as Judge Milburn noted in dissent, App., *infra*, 22a, the Sixth Circuit adopted "a case-by-case comparison of the level of coordination" that is unrelated to the purposes of the Double Jeopardy Clause.

Nothing suggests that the government commenced the criminal prosecution against respondent out of dissatisfaction with the result obtained in the civil proceeding. Respondent was indicted in February 1993, long before the outcome of the forfeiture proceeding was known. Indeed, the forfeiture action was scheduled for trial in June 1993. The government's simultaneous pursuit of these cumulatively available remedies does not suggest any intent to obtain double punishment in sequential proceedings. Rather, it reflects the fact that civil and criminal actions cannot be formally joined in our system of procedure. And, although respondent elected to resolve the civil part of the case by settlement, he "knew at the time of the settlement in the civil forfeiture action that a criminal action was pending." App., *infra*, 23a (Milburn, J., dissenting). He was therefore aware "that the government was pursuing its full range of remedies against him." *Id.* at 22a. Those circumstances do not bespeak the type of government overreaching that calls into action the doctrine against multiple punishments in successive proceedings. See *Halper*, 490 U.S. at 451 n.10.

4. The decision in this case will have a substantial and adverse impact on the administration of justice in the Sixth Circuit. The United States will justifiably be reluctant to commence, prosecute, or settle

civil forfeiture actions expeditiously if by so doing it necessarily precludes the prosecution of serious criminal offenses. Moreover, as the experience of the Ninth Circuit demonstrates, the decision below is likely to engender literally hundreds of motions to dismiss indictments, post-trial motions for relief, and collateral attacks on existing judgments. That consequence will add substantial delay to the adjudication of defendants' guilt and require burdensome post-trial litigation over settled criminal convictions.

Both the Sixth Circuit's decision and the Ninth Circuit's decision in *$405,089.23*, in which we have also filed a petition for a writ of certiorari, are before the Court at the same time. As we explain in our petition in *$405,089.23*, we believe that the Court should grant certiorari and give plenary consideration to both cases. While the two cases present similar double jeopardy issues, those issues arise in somewhat different factual and legal contexts that may illuminate the Court's consideration of the problem. In particular, as we have noted, *$405,089.23* involves property alleged to be the "proceeds" of criminal activity, not property alleged to have been used or intended for use to facilitate the commission of a narcotics offense.[4] In order to ensure that this

[4] Because this case involves a civil proceeding that the Sixth Circuit believed was followed by a constitutionally separate criminal prosecution, consideration of this case together with *$405,089.23* may also allow the Court to settle a question that was expressly left undecided in *Kurth Ranch*, *i.e.*, what significance the order of the proceedings has in the double jeopardy analysis, see 114 S. Ct. at 1947 n.21, including questions as to the appropriate remedy. In this connection, we note that in remanding for further proceedings, *Halper* itself suggested that a second sanction would be barred only to the extent that it was punitive, 490 U.S. at 449-450, 452, and that this Court's cases support the proposition that double jeopardy violations, like other constitutional violations, must be remedied only to the extent of the injury suffered. See, *e.g.*, *Jones* v. *Thomas*, 491 U.S. 376, 380-387 (1989); *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986).

Court has a full opportunity to explore the double jeopardy issues that continue to divide the lower courts, we respectfully suggest that the Court grant certiorari in both cases and consolidate them for argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 94-1127

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GUY JEROME URSERY, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Eastern District of Michigan

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Decided and Filed July 13, 1995

Before: JONES, CONTIE, and MILBURN, Circuit Judges.

JONES, J., delivered the opinion of the court, in which CONTIE, J., joined. MILBURN, J. (pp. 17-24), delivered a separate dissenting opinion.

NATHANIEL R. JONES, Circuit Judge. Defendant Guy Jerome Ursery is appealing his conviction and sentence for manufacture of marijuana on several grounds. Because we find that the civil forfeiture judgment followed by a criminal conviction in this case constitute double jeopardy, we reverse the decision of the district court. Because we find this issue to be dispositive, we decline to reach the other issues raised by Ursery in this appeal.

I. Background

In May 1992, the ex-fiancee of Defendant Ursery's son, Heather McPherson,[1] informed the Michigan State Police that Ursery grew marijuana on his property. Based on this information and further investigation by the police, the police obtained a warrant to search the Ursery home. On July 30, 1992, officers executed the warrant and seized 142 marijuana plants growing in six plots from a field to the west of the rural home. While the police initially believed that the field was part of Ursery's property, it was later determined that three of the plots were 25 feet from Ursery's property line and the other three plots were about 150 feet away from the property line. The plants ranged in height from about six inches to two feet. From the Ursery residence, the police obtained an ammunition case with two plastic bags filled with marijuana seeds, two loaded firearms, a box with ten plastic bags containing marijuana seeds, marijuana stems and stalks, and a growlight.

On September 30, 1992, the United States Attorney's office in Detroit instituted a civil forfeiture action against Ursery and his wife. The government brought the action pursuant to 21 U.S.C. § 881(a)(7)[2] and sought forfeiture of the Ursery residence.

[1] McPherson was Brian Ursery's girlfriend and later fiancee from September 1989 to February 1992.

[2] This section provides the following:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7) (1988).

The action was brought before Judge Lawrence Zatkoff of the United States District Court for the Eastern District of Michigan and was placed on the court's civil docket. The government served a seizure warrant for the Ursery residence on Ursery at his residence on October 2, 1992. Judge Zatkoff conducted a scheduling conference on November 9, 1992, and scheduled trial for July 1993. The Urserys and the government entered into a settlement in which the Urserys agreed to pay the government $13,250.00. A consent judgment was entered on May 24, 1993. The Urserys paid the judgment on June 17, 1993.

During this time, on February 5, 1993, a federal grand jury in the Eastern District of Michigan returned a criminal indictment which charged Ursery with one-count of manufacture of marijuana in violation of 21 U.S.C. § 841(a)(1). Ursery's pretrial motions for an evidentiary hearing and to suppress evidence, for disclosure of informant, and to strike the mandatory minimum sentence provision were denied following argument on June 16, 1993. The case was originally assigned to Judge Stewart A. Newblatt, but was reassigned to Judge Avery Cohn for trial. Jury trial commenced on June 30, 1993 and the jury returned a guilty verdict on July 2, 1993. Ursery's post-trial motions for a new trial and for dismissal on double jeopardy grounds were denied

on September 13, 1993. On January 19, 1994, Judge Cohn sentenced Ursery to 63 months imprisonment and four years of supervised release. On March 21, 1994, Judge Cohn granted Ursery's request for bond pending appeal.

II. Discussion

Ursery argues that his criminal prosecution and punishment after settlement of a civil forfeiture proceeding based on the same conduct violated the Double Jeopardy Clause of the Fifth Amendment. This court reviews *de novo* the constitutional issue of double jeopardy. *Costo v. United States*, 904 F.2d 344, 346 (6th Cir. 1990).

A. No Waiver

We address first, however, the government's argument that Ursery has waived his claim of double jeopardy. Ursery first raised his claim of double jeopardy in a post-trial Motion for Dismissal. The government argues that Federal Rule of Criminal Procedure 12 requires that motions which object to the institution of the proceedings must be raised prior to trial or they are waived. *See* Fed. R. Crim. P. 12 also explicitly states that "the court for cause shown may grant relief from the waiver." *See* Fed. R. Crim. P. 12(f).

Our response to the government's argument is two-fold. First, we note that although the government raised this issue of waiver below, the district court did not deem Ursery's double jeopardy argument waived, but addressed the merits of the issue. As such, we are entitled to review this as an issue that

was passed upon below.[3] Second, we find that Ursery has shown cause for not raising the Double Jeopardy issue prior to trial in indicating that the Supreme Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), which clarified its position that any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment, was decided on June 28, 1993, a mere two days before Ursery's criminal trial commenced. Thus, we find that Ursery did not waive his double jeopardy claim, and we turn to the merits of his claim.

B. Protection of the Double Jeopardy Clause

"[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). As the Ninth Circuit has recently noted, "at its most fundamental level [the Double Jeopardy Clause] protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense." *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1215 (9th Cir. 1994). To decide whether the government has violated Ursery's constitutional right this court must make three key determinations: (1) whether the civil forfeiture in the instant case constitutes "*punishment*" for

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[3] Even if the district court had not addressed the merits of this issue, we still would be entitled to reach this issue where we find that " 'injustice might otherwise result.' " *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

double jeopardy purposes; (2) whether the civil forfeiture and criminal conviction are punishment for *the same offense*; and (3) whether the civil forfeiture and criminal prosecution are *separate proceedings*. Because we find the answer to each of these questions to be in the affirmative, we hold that Ursery's criminal conviction is a second punishment that violates the Double Jeopardy Clause.

The district court denied Ursery's motion for dismissal on double jeopardy grounds stating the following:

> The forfeiture proceeding was settled by a consent judgment. That is not an adjudication. Furthermore, the forfeiture proceeding and criminal conviction were "part of a single, coordinated prosecution of [a] person[] involved in alleged criminal activity." *United States v. Millan*, [2 F.3d 17, 20] (2d Cir. 1993).

J.A. at 29-30. For the reasons that follow, we reverse this holding of the district court.

C. Jeopardy Attached

Before addressing the three key questions of the double jeopardy analysis outlined above, we note our first disagreement with the district court: the fact that the civil forfeiture proceeding was settled by a consent judgment does not preclude a double jeopardy analysis here. The consent judgment in the forfeiture proceeding was an adjudication for double jeopardy purposes because jeopardy attached when the judgment of forfeiture was entered against Ursery.

Ursery's consent judgment in his civil forfeiture action is analogous to a guilty plea entered pursuant to a plea agreement in a criminal case. Although in jury trials, jeopardy attaches when the jury is sworn,

Crist v. Bretz, 437 U.S. 28, 38 (1978), and in non-jury trials jeopardy attaches "when the court begins to hear evidence," *Serfass v. United States*, 420 U.S. 377, 388 (1975), jeopardy attaches to a guilty plea pursuant to a plea agreement upon the *court's acceptance* of the plea agreement. *United States v. Smith*, 912 F.2d 322, 324 (9th Cir. 1990); *United States v. Kim*, 884 F.2d 189, 191 (5th Cir. 1989); *Fransaw v. Lynaugh*, 810 F.2d 518, 523 & n.9 (5th Cir.) (collecting cases), *cert. denied*, 483 U.S. 1008 (1987); *United States v. Vaughan*, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983). The fact that there has been no trial in which a jury is sworn or the court hears evidence does not preclude jeopardy from attaching to a plea entered pursuant to a plea agreement. Similarly, the fact that there has been no trial in a civil forfeiture proceeding does not preclude the attachment of jeopardy to a forfeiture judgment. Jeopardy attaches in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture and enters the judgment of forfeiture. *See United States v. Tamez*, —— F. Supp. ——, 1995 WL 139362, at *8 (E.D. Wash. March 13, 1995) (holding that jeopardy attached to stipulated civil forfeiture when court entered the decree of forfeiture).

Nor does the Seventh Circuit's holding in *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994), support the argument that jeopardy did not attach to the judgment of forfeiture in the instant case. In *Torres* the Seventh Circuit held the following:

> Torres received notice inviting him to make a claim in the civil forfeiture proceeding. He did not. As a result, he did not become a party to

> the forfeiture. There was no trial; the $60,000 was forfeited without opposition, and jeopardy did not attach. You can't have double jeopardy without a former jeopardy. *Serfass v. United States*, 420 U.S. 377, 389, 95 S.Ct. 1055, 1063, 43 L.Ed.2d 265 (1975). As a non-party, Torres was not at risk in the forfeiture proceeding, and "[w]ithout risk of a determination of guilty, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391-92, 95 S.Ct. at 1064.

28 F.3d at 1465. *Torres* does not stand for the proposition that jeopardy does not attach to a civil forfeiture when there is no trial; it stands for the proposition that jeopardy does not attach to a civil forfeiture when the party claiming double jeopardy was not a party to the forfeiture proceeding, and thus was never at risk of having a forfeiture judgment entered against him. *See United States v. Shorb*, 876 F. Supp. 1183, 1187 n.4 (D. Or. 1995) ("As the law now stands, a criminal defendant who asserts a property claim in a forfeiture proceeding plainly does so under a threat of jeopardy."). *See also United States v. Walsh*, 873 F. Supp. 334, 336-7 (D. Ariz. 1994) (citing *Torres* for proposition that jeopardy did not attach to forfeiture proceeding where defendant did not make any claim in civil forfeiture proceeding); *United States v. Branum*, 872 F. Supp. 801, 803 (D. Or. 1994) (same); *United States v. Kemmish*, 869 F. Supp. 803, 805-06 (S.D. Cal. 1994) (same).

In the instant case, Ursery, unlike Torres, Walsh, Branum, or Kemmish, did make a claim in the forfeiture proceeding, and actively pursued that claim.

Not only was Ursery at risk of a forfeiture judgment, he actually suffered forfeiture. Consequently, jeopardy attached when the forfeiture judgment was entered against Ursery.

D. Double Jeopardy Analysis

1. Punishment

In *Halper*, the Supreme Court considered whether and under what circumstances a civil penalty may constitute "punishment" for the purposes of double jeopardy analysis. 490 U.S. at 436. In *Halper*, the defendant was first criminally prosecuted for 65 counts of making false medical reimbursement claims totalling approximately $585. He was convicted and sentenced to two years imprisonment and fined $5,000. Subsequently, the government brought a civil action which potentially subjected Halper to a civil penalty of $130,000 for the false claims. The Supreme Court determined that a particular civil penalty could be "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" in spite of its civil label. 490 U.S. at 442. The Court stated the following:

> The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to

serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a *civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either rebutive or deterrent purposes, is punishment, as we have come to understand the term.* We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 447-49 (citations omitted) (emphasis added). This case provides the foundation for the instant determination.

In 1993 the Supreme Court decided *Austin v. United States*, 113 S. Ct. 2801, in which it held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7). The Court found that civil forfeitures under §§ 881(a)(4) and (a)(7) were punishment because, under the rationale in *Halper*, these penalties did not serve solely a remedial purpose. 113 S. Ct. at 2812. Specifically, after careful review, the Court made the following declaration:

> In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881

> (a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," *Browning-Ferris* [*Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257] 265 [(1989)], 109 S. Ct. at 2915 . . . .

Id. (footnote omitted). Thus, under *Halper* and *Austin*, any civil forfeiture under § 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes. *Cf. United States v. $405,089.23 U.S. Currency*, 33 F.3d at 1219-22 (holding that civil forfeiture under § 881(a)(6) constitutes punishment for double jeopardy purposes because *Austin* "resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause").

2. Same Offense

The Double Jeopardy Clause protects the accused from multiple punishments in multiple proceedings for *the same offense*. Under *United States v. Dixon*, 113 S. Ct. 2849 (1993) and *Blockburger v. United States*, 284 U.S. 299 (1932), the test for whether two offenses constitute the "same offense" is whether "each offense contains an element not contained in the other." *Dixon*, 113 S. Ct. at 2856.

The government argues that the civil forfeiture and criminal conviction here do not constitute punishment for the same offense because the criminal prose-

cution requires proof that a *person*, the defendant, committed the crime, while the forfeiture requires proof that the *property* subject to forfeiture has been involved in the commission of a criminal violation. Thus each offense requires an element that the other does not. We disagree with this analysis.

We find that the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense. The forfeiture applies to "[a]ll real property . . . which is used . . . to commit or to facilitate . . . a violation of this subchapter." 21 U.S.C. § 881(a)(7). Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate Ursery's residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action. *See Oakes v. United States*, 872 F. Supp. 817, 824 (E.D. Wash. 1994) (reaching this very conclusion)[4]; *see also United States v. Tilley*, 18 F.3d 295, 297-98 (5th Cir.) ("[I]f the prior civil forfeiture proceeding, which was predicated on the

[4] The court declared the following:

> Any forfeiture under section 881(a)(7), therefore, requires a preceding violation of the controlled substance statutes. Thus, the Government could not have attempted to take Mr. Oakes's home had Mr. Oakes not manufactured marijuana on the premises. To accept the Government's argument that the sections involve different elements simply because one section of the statute deals with property and the other people, would be to adopt a circular and illusory theory.

872 F. Supp. at 824.

same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause will bar the pending criminal trial."), *cert. denied*, 115 S. Ct. 574 (1994); *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994) ("[U]nless the civil forfeiture under § 881(a)(4) can be predicated upon some offense other than those for which McCullogh has already been tried, the civil forfeiture is barred by the Double Jeopardy Clause.").[5]

3. Separate Proceedings

The Supreme Court has made clear that the government may "seek[] and obtain[] both the full civil

[5] The fact that the government did not have to prove that Ursery manufactured marijuana to obtain the consent judgment in the instant case does not alter the nature of the same offense test. As with a plea of *nolo contendere*, the double jeopardy bar is triggered not by the evidence proved, but by the elements charged. *Cf. Brown v. Foltz*, 583 F. Supp. 1063, 1069 (E.D. Mich.) (holding that plaintiff was placed in double jeopardy when he pled *nolo contendere* to simple larceny and was subsequently convicted of armed robbery since under Michigan law larceny was a lesser-included offense of armed robbery and the convictions arose out of same transaction), *aff'd*, 754 F.2d 372 (6th Cir. 1984); *United States v. Marcus Schloss & Co.*, 724 F. Supp. 1123, 1126 (S.D.N.Y. 1989) (stating that *nolo contendere* plea furnishes sufficient basis for double jeopardy claim); *Chikitus v. Shands*, 373 So.2d 904, 905 (Fla. 1979) (holding that plaintiff's double jeopardy claim based on his prior *nolo contendere* plea was not barred because relevant consideration is not nature of evidence adduced at prior trial, but elements of previous crime charged); *State v. Gobern*, 423 A.2d 1177, 1179 (R.I. 1981) (holding that once *nolo contendere* plea is accepted by court, jeopardy attaches).

penalty and the full range of statutorily authorized criminal penalties *in the same proceeding*." *Halper*, 490 U.S. at 450 (emphasis added). There is disagreement among the circuits, however, as to when a civil forfeiture action and criminal prosecution can properly be considered components of a single proceeding so that double jeopardy is not triggered. We find that the facts in this case simply do not support a determination that the civil forfeiture and criminal prosecution constituted such a single proceeding.

In *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994), the Second Circuit concluded that a civil forfeiture suit and criminal prosecution constituted a single proceeding that did not implicate double jeopardy concerns. In reaching this conclusion the court stated the following:

> In the instant case warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent. In addition, the Stipulation agreed to by the parties involved not only the seized properties of the civil suit, but also properties named in the criminal indictment that were under restraining order. Furthermore, the civil complaint incorporated the criminal indictment. Finally, the [Defendants] were aware of the criminal charges against them when they entered into the Stipulation. Given these circumstances, we reach the conclusion that the civil and criminal actions were but different prongs of a single prosecution of the [Defendants] by the government.

2 F.3d at 20. Comparing this statement to the facts of the instant case, the *only* similarity is that Ursery

was aware of the criminal charges against him at the time he settled the civil forfeiture suit. This similarity is insufficient to warrant application of *Millan*'s holding to the instant case.

In contrast, the Ninth Circuit has rejected the *Millan* view:

> We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding."

$405,089.23 U.S. Currency, 33 F.3d at 1216. The court found that the parallel proceedings in that case were separate proceedings for double jeopardy purposes. *Id.* at 1218.

The government argues that the fact that the civil forfeiture action and criminal action were commenced roughly four months apart should not deter application of *Millan*, and points to the Eleventh Circuit's recent decision, *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994), in which the court found a single proceeding even though the civil forfeiture action and criminal action began and ended on different dates. The government points to the Eleventh Circuit's explanation that, "[a]s in *Millan*, there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action." 13 F.3d at 1499. We do not find this rationale to be dispositive of the issue.

The Ninth Circuit's rationale in *$405,089.23 U.S. Currency* suggests that parallel civil forfeiture and

criminal proceedings will always violate the Double Jeopardy Clause. *See* 33 F.3d at 1216 ("A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time.") (emphasis in original). The Ninth Circuit completely rejects the Second and Eleventh Circuit's efforts to consider the parallel proceedings as one prosecution. *See id.* at 1217 ("We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.' "). While we acknowledge the Ninth Circuit's approach, we also find it unnecessary to fully adopt the Ninth Circuit's view in this case. It is merely our view that in so far as the existence of a "single, coordinated proceeding" could arguably satisfy the requirements of the Double Jeopardy Clause, as suggested by the Second and Eleventh Circuits, the facts in this case fail to reveal such a single, coordinated proceeding. In the instant case, the record reveals no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution as a coordinated proceeding. Moreover, as government counsel made clear at oral argument, there has been no communication between the government attorneys who handled Ursery's criminal prosecution and those who handled the civil forfeiture action. The civil forfeiture proceeding and the criminal proceeding were instituted four months apart, presided over by different district judges, and resolved by separate judgments. The district court found these two proceedings to be part of a "single, coordinated proceeding" without providing any factual support for this determination. As a matter of principle, applying a label to something does not

make it so. Without a reasonable analysis of the indicia of coordination, we do not believe these two proceedings logically become part of a single, coordinated procedure merely by labeling them as such. Similar to the Ninth Circuit, we find that applying the label of "single, coordinated prosecution" to the facts of this case simply goes too far. The civil forfeiture proceeding and the criminal prosecution were two separate proceedings for purposes of double jeopardy analysis.[6]

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[6] Nor does the Supreme Court's recent holding in *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994) alter this conclusion. In *Kurth Ranch*, the Court examined "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." 114 S. Ct. at 1941. In beginning its analysis, the Court explained that

> "[the State] no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, *or indeed, if it had assessed the tax in the same proceeding that had resulted in his conviction.* Here, we ask only whether the tax had punitive characteristics that subject it to the constraints of the Double Jeopardy Clause."

Id. at 1945 (citations omitted) (emphasis added). In *Kurth Ranch*, the Court found that the tax proceeding, initiated after the taxpayer's arrest for conduct giving rise to the tax obligation, constituted a successive proceeding to the taxpayer's criminal proceeding. *Id.* at 1947 n.21. The Court did not consider whether the contemporaneous criminal prosecution and tax proceeding could be viewed as a "single, coordinated proceeding" for purposes of double jeopardy analysis. *See Torres*, 28 F.3d at 1465 (noting the same in dicta). Instead, the Court found that the State's assessment of the tax in a proceeding separate from the taxpayer's criminal prosecution necessarily constituted separate proceedings

III. Conclusion

For the reasons stated above, we find that the civil forfeiture judgment against Ursery followed by his criminal conviction constituted double jeopardy. Consequently, we reverse the judgment of the district court, and we remand the case to that court with instructions to reverse Ursery's conviction and vacate his sentence.

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for the purpose of double jeopardy analysis. This holding, to the extent that it is applicable to the instant case, is in accord with our view that the civil forfeiture proceeding and the criminal prosecution in the instant case were two separate proceedings for purposes of double jeopardy analysis.

Finally, we note that, contrary to the dissent's suggestion, the fact that the Court did not address the civil forfeiture proceeding which also existed in *Kurth Ranch* simply has no precedential value in this case.

MILBURN, Circuit Judge, dissenting. The majority holds that the civil forfeiture judgment followed by a criminal prosecution in this case violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. I respectfully dissent.

Defendant argues that the imposition of criminal punishment against him, in addition to the civil forfeiture proceedings instituted against his home, is prohibited by the Double Jeopardy Clause. However, in its memorandum and order issued on September 14, 1993, the district court denied defendant's motion to dismiss on double jeopardy grounds, finding that the civil forfeiture proceeding and the criminal conviction were "part of a single, coordinated prosecution of [a] person involved in alleged criminal activity,' " J.A. 29-30, and that such an effort did not violate the Double Jeopardy Clause. For the reasons that follow, I would affirm this holding of the district court.

I.

In *United States v. Halper*, the Supreme Court held that a civil sanction, when applied against an individual also subject to criminal conviction, may constitute "punishment" that requires a double jeopardy analysis. *United States v. Halper*, 490 U.S. 435, 448 (1989). However, the Court indicated that its decision was not intended to "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." *Halper*, 490 U.S. at 450-51. Thus, the Double Jeopardy Clause offers protection when the government has already imposed a penalty, either civil or criminal, and

seeks to impose further punishment out of dissatisfaction with the earlier result, *id.* at 451 n.10, but not in the instance of a single proceeding seeking the full range of available sanctions. *See also United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) (citing *United States v. Bizzel*, 921 F.2d 263, 267 (10th Cir. 1990)) (finding that the order of penalties is not material to the double jeopardy question). The Court recently reaffirmed this principle in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994).[1]

Unlike the majority, I believe that this case involves a sufficiently coordinated proceeding to fall under the holdings in *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994), and *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994). In *Millan*, the Second Circuit found that the civil forfeiture action against defendant's bank accounts and certain properties and his conviction on narcotics charges were not subject to double jeopardy analysis because the government's actions were part of a "single, coordinated prosecution of persons involved in alleged criminal activity." *Millan*, 2 F.3d at 20. It is true, as the majority points out, that *Millan* involved a much clearer case of coordinated proceedings. However, the Second Circuit's concern in that case, and

[1] In *Kurth Ranch*, the Court noted that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction." *Kurth Ranch*, 114 S. Ct. at 1945 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)).

its focus, was whether the timing of the civil and criminal actions allowed the government to punish the defendant with a second action if it believed that the defendant had not received a sanction that was adequately severe in the first case. The Second Circuit stated that its decision did not run afoul of the Supreme Court's concern in *Halper* that the government might abuse its resources by seeking to punish defendants a second time because the civil and criminal actions at issue were contemporaneous, and it was clear to all the parties that the government was pursuing the full range of its remedies regardless of the outcome in either the civil or criminal proceedings. *Millan*, 2 F.3d at 20-21. This was also the logic of the Eleventh Circuit in *One Single Family Residence*, in which the court found that "the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendant] . . . falls within the contours of a single, coordinated prosecution." *One Single Family Residence*, 13 F.3d at 1499.[2] It is this logic that underlies my conclusion that there was no double jeopardy violation in this case.

[2] In *One Single Family Residence*, a civil forfeiture action was instituted against the home of the defendant in October 1990; five months later, in late March 1991, an indictment was returned against the defendant. The government pursued both remedies, obtaining a conviction on October 30, 1991, and a subsequent order of forfeiture. The Eleventh Circuit noted, as the Second Circuit had in *Millan*, that the case involved no potential for the government to seek a second punishment out of dissatisfaction with the outcome in the first action because the commencement of a civil action before the imposition of a criminal penalty precluded such a result. *One Single Family Residence*, 13 F.3d at 1499 (citing *Millan*, 2 F.3d at 20).

I believe that the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings are the central factors in assessing the double jeopardy concerns in this case. Such an approach avoids the inevitable difficulty of a case-by-case comparison of the level of coordination, the majority's method for making this determination. Merely looking at whether the proceedings at issue bear sufficient similarity to the proceedings in *Millan* presents the difficult problem of determining how much similarity it required to permit a finding of a single, coordinated proceeding. For example, in this case, the proceedings against defendant and his property took place in close time proximity to one another. The government commenced civil forfeiture proceedings against the home owned by defendant and his wife on September 30, 1992, and a grand jury returned an indictment against defendant on February 5, 1993. Pursuant to a stipulated settlement agreement, the district court entered a consent judgment in the civil forfeiture proceeding on May 24, 1993. Defendant was convicted on the criminal charge on July 2, 1993. It was clear to defendant at the time he entered into the stipulated settlement agreement that the government was pursuing its full range of remedies against him. Is this enough factual similarity to apply *Millan* and *One Single Family Residence*? The majority concludes that it is not, but another panel could easily reach a contrary conclusion. Given the inherent problems in following such an unpredictable approach, I feel it is necessary to determine the case on a more objective and reliable basis. I conclude that this case involves a single, coordinated proceeding because it does not present the potential for government abuse of process; the government instituted and pursued both proceedings against defendant before it knew the outcome of either case.

It is true, as the majority points out, that the civil and criminal proceedings against defendant were handled by separate counsel from the United States Attorney's office and that the government attorneys did not appear to be actively collaborating. However, in *Millan*, the Second Circuit observed that the fact of separate proceedings is not dispositive in determining whether the government is employing a single proceeding to prosecute a defendant. "Civil and criminal suits, by virtue of our federal system of procedure, must be filed and docketed separately. Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated." *Millan*, 2 F.3d at 20. In this case, the civil and criminal proceedings against defendant and his property were active during the same time frame, and defendant knew at the time of the settlement in the civil forfeiture action that a criminal action was pending. Moreover, both actions resulted from a search of defendant's property and the surrounding areas, a search that revealed extensive marijuana production and possession.

In *United States v. Torres*, 28 F.3d 1463, 1464-65 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994), the Seventh Circuit questioned the continued applicability of *Millan* and *One Single Family Residence* after the Supreme Court's recent decision in *Kurth Ranch*. However, I do not believe that *Kurth Ranch* necessarily changes this result. *Kurth Ranch* does not hold that every civil action the government pursues against

a defendant subject to other penalties constitutes a separate proceeding. In fact, *Kurth Ranch* itself included a criminal penalty, a civil forfeiture action, a bankruptcy action, and a tax assessment. *Kurth Ranch*, 114 S. Ct. at 1941-44. There was apparently no challenge to the simultaneous pursuit of a criminal action and a civil forfeiture proceeding, the case we are dealing with here. Moreover, the Court, by its own language, distinguished *Kurth Ranch*, noting that the tax statute at issue did not raise "the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." *Kurth Ranch*, 114 S. Ct. at 1947 n.21.

The Court's primary focus in *Kurth Ranch* was on the issue of whether Montana's drug tax constituted a penalty for double jeopardy purposes. The Court never questioned the civil forfeiture action but dealt specifically and exclusively with the tax assessment. The language of the decision suggests that the Court viewed the case as different from other civil actions because it was based on a tax issue. The Court said: "[T]he tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." *Kurth Ranch*, 114 S. Ct. at 1947. Thus, in *Torres*, the Seventh Circuit interperted *Kurth Ranch* as dealing with the collection of a monetary penalty for a crime. *Torres*, 28 F.3d at 1464-65. The Montana tax could be imposed only after a criminal conviction was obtained. There was no question that the same conduct was involved. That is not the case here. Defendant did not have to be convicted of the drug

offense before a civil forfeiture could be pursued. In fact, the civil proceedings were begun first. Therefore, I conclude that neither the civil forfeiture nor the criminal conviction was imposed as punishment consequent upon defendant's criminal conviction or admission of guilt.

Because I conclude that the government was not acting to pursue a second punishment out of dissatisfaction with the first outcome, the only remaining concern is whether the "total punishment exceed[s] that authorized by the legislature." *Halper*, 490 U.S. at 450. Defendant was convicted of violating 21 U.S.C. § 841(a)(1). Under 21 U.S.C. § 841(b)(1)(B)(vii), defendant was subject to a term of imprisonment of not less than five years, nor more than 40 years; a fine not to exceed $2,000,000; and a term of supervised release of at least four years. Defendant was sentenced to 63 months imprisonment and four years of supervised release. No fine was imposed. Thus, defendant's sentence was clearly within the range of authorized punishment.

In addition, pursuant to 21 U.S.C. § 881(a)(7), any real property that is used or intended to be used to facilitate the commission of a violation of 21 U.S.C. § 801 *et seq.* that is punishable by more than one year in prison is subject to forfeiture unless the owner qualifies as an "innocent owner." Marijuana stems and seeds were found in defendant's home during the search of his property; furthermore, the police received notice that defendant had been seen with marijuana at his home and had shared marijuana with family members and acquaintances. Defendant's home was, therefore, properly subject to civil for-

faiture under 21 U.S.C. § 881(a)(7), a civil penalty well within the bounds set forth by Congress.

II.

I also note my disagreement with the majority's conclusion that the civil forfeiture action and defendant's criminal prosecution are based on the same offense. The majority concludes that the civil forfeiture necessarily requires proof that defendant was manufacturing marijuana, and the criminal offense is effectively subsumed by the forfeiture. Again, I disagree.

In the criminal prosecution in this case, defendant was convicted on one count of manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1). For defendant to be found guilty under this statute, the prosecution had to show (1) that defendant manufactured marijuana and (2) that he did so intentionally or knowingly. *See United States v. Litteral*, 910 F.2d 547, 550 (9th Cir. 1990) (requiring the same elements to prove a charge of manufacturing methamphetamine). However, defendant was charged with the manufacture of marijuana only during the year 1992.

By contrast, the civil forfeiture complaint charged that defendant's property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance for several years. J.A. 19. In order to prevail in the civil forfeiture action, the government would have to have produced proof of probable cause to believe (1) that the property was used or intended to be used to facilitate the manufacture and distribution of marijuana and (2) that this offense was punishable under Title 21 of the

United States Code by imprisonment of more than one year. 21 U.S.C. § 881(a)(7); *United States v. Real Property Known and Numbered as Rural Route 1, Box 137-B, Cutler, Ohio*, 24 F.2d 845, 848 (6th Cir. 1994). The majority claims that the government could not confiscate defendant's residence without a showing that he was manufacturing marijuana. This view, however, overlooks the fact that the civil forfeiture action required a showing that defendant's property was involved in the commission or facilitation of both processing and distribution of a controlled substance over the course of several years. As earlier stated, the criminal indictment charged defendant only with the manufacture of a controlled substance during 1992. Had the civil forfeiture action been adjudicated, the government might have established its case with evidence relating solely to processing and distribution activities in years other than 1992. Under those circumstances, the criminal prosecution and the civil forfeiture action would undoubtedly relate to separate offenses under the Double Jeopardy Clause. *United States v. Miller*, 870 F.2d 1067, 1069-72 (6th Cir. 1989).

III.

For the reasons stated, I would hold that the civil forfeiture action against defendant's property followed by defendant's criminal prosecution did not create a double jeopardy violation, and I would affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92 CV 75943 DT

Honorable Lawrence Zatkoff

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVMENTS AND APPURTENANCES, DEFENDANT.

COMPLAINT FOR FORFEITURE

NOW COMES the United States of America, Plaintiff, STEPHAN J. MARKMAN, United States Attorney, by and through JOYCE F. TODD, Assistant United States Attorney, and states in support of this Complaint for forfeiture in rem that:

1) This action is a civil action *in rem* brought to enforce the provision of 21 U.S.C. § 881(a)(7) for the forfeiture of real property which was used or intended to be used to facilitate the commission of a violation of Title 21, United States Code, Section 801 *et seq.* punishable by more than one year's imprisonment.

2) This Court has jurisdiction to hear this action pursuant to 28 U.S.C. § 1324, 1355, 1356, 1395, and 21 U.S.C. § 881(a)(7).

3) That the defendant real property with building, appurtenances, and improveemnts is legally described as follows:

> Part of the West ½ of the Northeast ¼ of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North ¼ corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minuts 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

and is commonly known as CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES.

4) Said property is currently titled in the name of Guy J. Ursery and Cynthia K. Ursery.

5) For several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance and is forfeitable under 21 U.S.C. § 881(a)(7), all as more fully set forth in the affidavit in support of seizure warrant issued by Magistrate Judge Virginia Morgan on September 30, 1992, and

assigned Miscellaneous Action No. 92 X 75843. Said seizure warrant, along with each and every allegation set forth in its supportive affidavit, are adopted and incorporated into the body of this Complaint by reference as if the same were fully and completely herein set forth as Appendix A.

WHEREFORE, the United States of America prays that a warrant for arrest of the defendant CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES; that due notice be given to all parties to appear and show cause why the forfeiture should not be decreed; that judgment be entered declaring the defendant property to be condemned and forfeited to the United States of America for disposition according to law; and that the United States of America be granted such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Respectfully submitted,

STEPHEN J. MARKMAN
United States Attorney

/s/ Joyce F. Todd
JOYCE F. TODD (P 31026)
Assistant U.S. Attorney
817 Federal Building
231 W. Lafayete
Detroit, MI 48226
(313) 237-4775

VERIFICATION

I, DAVID J. PORTELLI, state that I am an Assistant United States Attorney for the Eastern District of Michigan. I have read the foregoing Complaint for Forfeiture and asserts that the facts contained therein are true to the best of my knowledge and belief, based on information officially presented to me by agents of the Drug Enforcement Administration.

/s/ David J. Portelli
DAVID J. PORTELLI

Dated: *September 25, 1992*

VERIFICATION

I, CHRISTOPHER J. HACKBARTH, am a Special Agent of the Drug Enforcement Administration. I have read the foregoing Complaint for Forfeiture and assert that the facts contained therein are true to the best of my knowledge and belief, based upon knowledge possessed by me and/or on information received from other law enforcement agents.

/s/ CHRISTOPHER J. HACKBARTH

Dated: *September 25, 1992*

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92 CV 75843 DT

Honorable Lawrence Zatkoff

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES, DEFENDANT.

STIPULATION FOR ENTRY OF CONSENT JUDGMENT OF FORFEITURE

NOW COMES the Plaintiff, UNITED STATES OF AMERICA, STEPHEN J. MARKMAN, United States Attorney, by JOYCE F. TODD, Assistant United States Attorney; and claimants, GUY URSERY and CYNTHIA URSERY, by and through their attorney, LAWRENCE J. EMERY, and make the following stipulation:

1) This action is a civil in rem controlled substance forfeiture action brought pursuant to Title 21 USC § 881(a)(7).

2) This stipulation is submitted to resolve this action in its entirety.

3) The above parties, being aware of their rights in this matter hereby stipulate and agree as follows:

(a) Claimants, Guy Ursery and Cynthia Ursery, agree to pay $13,250.00 to the United States of America in full settlement of all claims of the United States against the real property located at 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, more fully described as:

> Part of the West ½ of the Northeast ¼ of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North ¼ corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called:

(b) Upon the such payment being made, the Lis Pendens that has been filed with the Shiawassee County Register of Deeds will be discharged by the United States of America.

(c) If the payment in full is not received by the United States on or before 60 days of the entry date of this judgment, the defendant property will

automatically be forfeited to the United States of America.

(d) The claimants, for purposes of this settlement only, do not contest that as provided in Title 28 USC § 2465, the United States and or its agents had reasonable cause for the seizure of defendant property.

Approved as to substance and form:

/s/ Joyce F. Todd
JOYCE F. TODD (P31026)
Assistant U.S. Attorney
231 W. Lafayette, 9th Floor
Detroit, MI 48226
(313) 237-4775
Dated: 5-20-93

/s/ Lawrence J. Emery
LAWRENCE J. EMERY
(P23263)
Attorney for Claimants
GUY URSERY
CYNTHIA URSERY
3401 E. Saginaw, Suite 104
Lansing, MI 48912
(517) 337-4866
Dated: 5-17-93

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92 CV 75843 DT

Honorable Lawrence Zatkoff

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES, DEFENDANT.

CONSENT JUDGMENT OF FORFEITURE

This matter having come before this Court pursuant to the Stipulation For Entry of Judgment entered into between the claimants, GUY URSERY and CYNTHIA URSERY, and the Plaintiff, UNITED STATES OF AMERICA. This Court, having reviewed that Stipulation, the other pleadings filed in this action, and being aware of the law applicable to this action;

IT IS HEREBY ORDERED THAT the claimants, Guy Ursery and Cynthia Ursery, shall pay $13,250.00

to the United States of America, within 60 days of the entry of this judgment;

IT IS FURTHER ORDERED THAT upon such payment being received, the real property, commonly known as 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, being more fully described as:

> Part of the West ½ of the Northeast ¼ of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North ¼ corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

shall be released from all claims of the United States of America.

IT IS FURTHER ORDERED that if the payment in full is not received by the United States on or before 60 days of the entry date of this judgment, the defendant property will automatically be forfeited to the United States of America.

IT IS FURTHER ORDERED THAT the parties further stipulate that the claimants, for purpose of this settlement only, do not contest that as provided in Tile 28 USC § 2465, the United States and or its

agents had reasonable cause for the seizure of defendant property.

/s/ Lawrence Zatkoff
LAWRENCE ZATKOFF
United States District Judge

Entered: May 24, 1993

Approved as to substance and form:

/s/ Joyce F. Todd
JOYCE F. TODD (P31026)
Assistant U.S. Attorney
231 W. Lafayette, 9th Floor
Detroit, MI 48226
(313) 237-4775
Dated: 5-20-93

/s/ Lawrence J. Emery
LAWRENCE J. EMERY
(P23263)
Attorney for Claimants
GUY URSERY
CYNTHIA URSERY
3401 E. Saginaw, Suite 104
Lansing, MI 48912
(517) 337-4866
Dated: 5-17-93

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 93-50016

UNITED STATES OF AMERICA, PLAINTIFF

v.

GUY JEROME URSERY, DEFENDANT

MEMORANDUM AND ORDER

I.

On July 2, 1993 a jury found defendant guilty of a violation of 21 U.S.C. § 841(a)(1), manufacture of marijuana. More particularly, the jury found defendant was growing a substantial number of marijuana plants in a heavily wooded area in close proximity to his home in rural Shiawasee County, Michigan. The offense was investigated by the Michigan State Police; there was no federal involvement other than at the prosecution stage. Defendant has yet to be sentenced.

Now before the Court are defendant's motion for a new trial and motion to dismiss. The motion to dismiss argues that the conviction constitutes double jeopardy, as a result of the civil forfeiture proceeding instituted and concluded in favor of the government before his conviction in this case. The motion

to dismiss is DENIED. The forfeiture proceeding was settled by a consent judgment. That is not an adjudication. Furthermore, the forfeiture proceeding and criminal conviction were "part of a single, coordinated prosecution of [a] person involved in alleged criminal activity." *United States v. Millan*, 1993 U.S. App. LEXIS 20165 (2nd Cir. 1993). While the Court is surprised that the Government proceeded with its forfeiture action before obtaining an indictment, it nevertheless recognizes that such a single coordinated prosecution does not give rise to double jeopardy.

The motion for new trial raises four issues:

1. Retaliation for refusal to become an informant.
2. Violation of due process and equal protection because of the lack of federal involvement in the investigation and the substantially higher penalties under federal law than under State law.
3. Prejudice because of the reference in the testimony to defendant's threatening to use a firearm against police officers and because the prosecutor in closing commented on defendant's not taking the witness stand.
4. Invalid search.

Issues 1 and 2 look to dismissal of the prosecution and will be treated as grounds for a judgment of acquittal, Fed. R. Crim. P. 29. Issue 3 looks to a second trial and will be treated as a motion for new trial, Fed. R. Crim. P. 33. Issue 4 was decided pretrial when Judge Stewart Newblatt denied a motion to suppress and will not be re-examined. If Judge Newblatt is wrong, defendant will be entitled to a

new trial in theory, but in practice the case would have to be dismissed. The Court notes, however, that the affidavit in support of the search warrant described the affiant's personal observation of growing marijuana in addition to the information furnished by a reliable informant.

II.

As to arguments regarding the threat of federal prosecution if defendant did not become an informant and the federal prosecution itself, the Sixth Circuit decision in *United States v. Allen*, 954 F.2d 1160 (6th Cir. 1992), is a short "no" answer. Nothing in the record suggests that the federal prosecutor did other than exercise discretion in taking the case to the grand jury and thereafter obtaining an indictment. Whether good or bad judgment was exhibited is not for the Court to decide. As stated in *Allen*, 954 F.2d at 1166:

> Prosecutors are given great discretion in determining which cases will be prosecuted: "[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute and what charge to file . . . generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668-69, 54 L.Ed. 2d 604 (1978) (footnote omitted).
>
> . . . . .
>
> The prosecutor may properly base his decision on the penalties available upon conviction when determining what offense will be charged against a defendant. *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 2204-05, 60 L.Ed. 2d 755 (1979).

The claim of prejudice arising from a State Police Officer's testimony that defendant threatened to shoot any police officer who came after him must be rejected. The statement was made in a response to a question about the presence of an excessive number of police officers at the execution of the search warrant. Defendant initially suggested the number was excessive. Defendant was also aware of his statement in advance of trial. The Court effectively told the jury to disregard the testimony of the State Police Officer. Under the circumstances more was not necessary to eliminate any possible prejudice.

The claim of prejudice regarding the prosecutor's final argument must also be rejected. No comment was made on the defendant's failure to testify. There was no dispute that marijuana was being grown in proximity to defendant's home. Defendant suggested the possibility of some third-party's growing the marijuana. In response, the prosecutor pointed out the unlikelihood of defendant's suggestion, since defendant (or for that matter others in the home) more than likely would have seen a stranger tending the plants.

III.

The motion for judgment of acquittal is DENIED. The motion for new trial is DENIED.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
United States District Judge

DATED: Detroit, Michigan
Detroit, Michigan

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case Number: 93-50016

UNITED STATES OF AMERICA

v.

GUY JEROME URSERY

LAWRENCE EMERY
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s) ——————.

☒ was found guilty on count(s) One after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:USC:841(a)(1)	Manufacture of Marijuana	7/30/92	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ——————, and is discharged as to such count(s).

☐ Count(s) —————— (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) One, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 363-64-7660

Defendant's Date of Birth: August 4, 1956

Defendant's Mailing Address:

1700 Braden Road
Perry, MI 48872

Defendant's Residence Address:

——————

——————

January 19, 1994
Date of Imposition of Sentence

/s/ Avern Cohn
Signature of Judicial Officer

AVERN COHN, U.S. District Judge
Name & Title of Judicial Officer

January 20, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty three (63) months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

a.m.

☐ at —— p.m. on ————.

☐ as notified by the Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☒ before 2 p.m. on February 24, 1994.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on ———— to ———— at ————————, with a certified copy of this Judgment.

————————
United States Marshal

By ————————
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

1. Defendant shall participate in a drug abuse program, if necessary as directed by the Probation Department

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptance reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not

associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Court reduced the Offense Level by 2 points as the Court finds that the firearms found

at defendant's residence should not be added in the Offense Level

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: at least 4 years

Fine Range: $12,500 to $2,000,000.00

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

APPENDIX G

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 841 of Title 21, United States Code, provides:

Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates sub-

section (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-

phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl) propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person com-

mits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be

not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,00 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 2 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more

than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5)

of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule VI, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to a narcotic drugs, marihuana, or depressant or stimulant sub-

stances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18, or imprisonment not more than five years, or both.

(c) Repealed. Pub.L. 98-473, Title II, § 224(a)(2), Oct. 12, 1984, 98 Stat. 2030.

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of his title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Boobytraps on Federal property; penalties; definitions

(e)(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

Wrongful distribution or possession of listed chemicals

(g)(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is

acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

* * * * *

Section 881 of Title 21, United States Code provides:

Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section

unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, ex-

cept that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, posses-

sion, or concealment of property described in paragraph (1) and (2) and any proceeds traceable to such property.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to

forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provision hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of

property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291(j)(b) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of

such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4)(A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority etsablished in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this subchapter, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may trans-

fer title to the property to the State, either without charge or for a nominal charge, through a legal instrument providing that—

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

Forfeiture and destruction of schedule I or II substances

(f)(1) All controlled substances in schedule I and II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such

raw materials or products under such circumstances as the Attorney General may deem necessary.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growth, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

Vesting of title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Stay of civil forfeiture proceedings

(f) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter

or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

Venue

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the crimnal prosecution is brought.

Agreement between Attorney General and Postal Service for performance of functions

(*l*) The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

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